IN THE

Supreme Court of the United States

OCTOBER TERM, 196[illegible].

No. [illegible] 1456

ARNOLD GEORGE LAUER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Arnold George Lauer, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on the 8th day of February, 1961, which affirmed the judgment of conviction of the United States District Court for the Southern District of Indiana, Evansville Division, the petitioner having been charged in a two count indictment with the unlawful sale of narcotics in violation of 26 U. S. C. A. Section 4705(a). The jury found the petitioner guilty of both counts and petitioner was sentenced to 7½ years on Count I, together with a fine of $3,000.00. In addition, the trial court imposed a concurrent sentence of 7½ years in Count II.

CITATIONS TO OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is printed in Appendix B hereto, *infra*, page 19, and is reported in 287 F. 2d 633 (West's Advance Sheets).

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on February 8, 1961. A timely motion for rehearing was filed on the 23rd day of February, 1961, and was denied on the 12th day of April, 1961.

The jurisdiction of this Court is invoked under 26 U. S. C. A., Section 1254(1), and Rule 22(2) of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED.

1. Whether the provisions of 26 U. S. C. A., Section 4705(a), are so vague and indefinite as to render them unconstitutional under the 5th and 6th Amendments to the Constitution of the United States.

2. Whether the provisions of 26 U. S. C. A., Section 4731 are unconstitutional, void and illegal, in that they delegate legislative powers of the Congress of the United States to the President, Secretary of the Treasury or his delegate, or upon any officer or employee of the Treasury Department whom he shall designate and appoint, in violation of Article I, Sections 1 and 8(18) of the Constitution of the United States.

3. Whether 26 U. S. C. A., Section 4731 is unconstitutional and void and violative of the 5th and 6th Amendments to the Constitution of the United States, in that it does not apprise a defendant of any substance that is

chemically identical with other enumerated substances, and does not set forth standards upon which said substances may be considered to be chemically identical.

4. Whether prejudicial error was committed by the trial court's announcement in the presence and hearing of the jury, that the defendant's motions for judgment of acquittal would be overruled.

5. Whether or not the evidence establishes entrapment as a matter of law.

STATUTES INVOLVED.

The statutory provisions involved are 26 U. S. C. A., Section 4702, 26 U. S. C. A., Section 4705(a) and 26 U. S. C. A., Section 4731, which are printed in Appendix A *infra*, page 15.

STATEMENT OF THE CASE.

The petitioner was indicted on December 21, 1959, in the United States District Court for the Southern District of Indiana, Evansville Division, for the crime of unlawful sale of narcotics in violation of 26 U. S. C. A., Section 4705(a). The indictment was in two counts. On December 30, 1959, petitioner was arraigned and entered a plea of not guilty to Counts I and II of the indictment, and filed his motions to dismiss Counts I and II of the indictment, which motions were overruled. On May 16, 1960, petitioner filed a special answer and plea, which alleged in substance that 26 U. S. C. A., Section 4705(a) was unconstitutional and void and in violation of the 5th and 6th Amendments to the Constitution of the United States, in that said statute does not define "narcotic drug" and that it is in violation of the 5th and 6th Amendments to the Constitution of the United States in that it does not inform the petitioner of the nature and cause of the accusation

against him, in the absence of a definition of a "narcotic drug", the sale of which is declared to be a crime. Petitioner further alleged that 26 U. S. C. A., Section 4731 was unconstitutional, void and illegal, in that it delegates the legislative power of the Congress of the United States to the President, Secretary of the Treasury, or his delegate, or upon any officer or employee of the Treasury Department whom the Secretary of Treasury shall appoint, in violation of Article I, Sections 1 and 8(18) of the Constitution of the United States.

Petitioner further alleged that 26 U. S. C. A., Section 4731 attempts to define a "narcotic drug" as any substance "chemically identical" to certain enumerated substances, without setting forth standards or defining in any way in what manner they should be "chemically identical" with the enumerated substances, and that in the absence of standards or definitions, said statute is unconstitutional and void, and violative of the 5th and 6th Amendments to the Constitution of the United States, in that it does not apprise petitioner of any way that a substance may be chemically identical with other enumerated substances and further for the reason that it violates Article I, Sections 1 and 8(18) of the Constitution of the United States by permitting some person, persons or group other than the Congress of the United States to establish what is a "narcotic drug." This special answer and plea was denied by the trial court.

Thereafter the matter proceeded to trial. At the close of the Government's evidence the petitioner moved for judgment of acquittal as to Counts I and II of the indictment, at which time the trial court, in the presence and hearing of the jury, announced: "I would deny each of the motions for judgment of acquittal."

Thereafter, the jury found the petitioner guilty of Counts I and II, and the trial court sentenced petitioner to 7½

years and fined him $3,000.00 on Count I and at the same time imposed a concurrent sentence of 7½ years upon Count II.

Petitioner relies upon the following evidence introduced during the course of the trial as establishing entrapment as a matter of law:

The testimony of John Arthur Smith, an informer, and of Detective Alton Cherry and narcotics agent, John Wilkie, was to the effect that the informer was "out to get petitioner." (Appendix p. 41.) That the informer's connection with the detective and narcotics agent was such that he asked the Sheriff of Posey County, Indiana, where he was then being held, to call Detective Cherry in Evansville, Indiana, by long distance; and thereafter, that Detective Cherry and narcotics agent Wilkie went to Mt. Vernon, Indiana, and obtained his release from jail. That although the informer was then charged with presenting a forged prescription for the purpose of obtaining narcotic drugs, he was brought to Evansville, Indiana, by the detective and narcotics agent, where he was released, without being taken to any jail or held in custody of any kind. That when the informer was released to the detective and narcotics agent, the prosecuting attorney and sheriff of Posey County, Indiana, were under the impression that the informer was going to be retained in custody by the officers. (Appendix p. 63.) The evidence also established that the informer had possession of narcotic drugs several times since the filing of the charges against petitioner (Appendix pp. 52 and 67) and once prior thereto; that although charged with the narcotics offense in Posey County, Indiana, he had not been tried for that offense (Appendix p. 50) nor had he been tried or charged with any offense connected with the possession of narcotics, other than the offense in Posey County, Indiana. In fact, the informer himself testified that he wanted "to get" this

petitioner (Appendix p. 57), and that he went to the home of Detective Cherry for the purpose of "getting petitioner." (Appendix p. 57.) The idea for creating the crime for which petitioner stands convicted was conceived at that time.

REASONS FOR GRANTING THE WRIT.

1. The provisions of 26 U. S. C. A., Section 4705(a) are so vague and indefinite as to render them unconstitutional under the 5th and 6th Amendments to the Constitution of the United States.

2. The provisions of 26 U. S. C. A., Section 4731 are unconstitutional, void and illegal, in that they delegate legislative powers of the Congress of the United States to the President, Secretary of the Treasury or his delegate, or upon any officer or employee of the Treasury Department whom he shall designate and appoint, in violation of Article I, Sections 1 and 8(18) of the Constitution of the United States.

3. 26 U. S. C. A., Section 4731 is unconstitutional and void and violative of the 5th and 6th Amendments to the Constitution of the United States, in that it does not apprise a defendant of any substance that is chemically identical with other enumerated substances, and does not set forth standards upon which said substances may be considered to be chemically identical.

This Court has apparently never been called upon to decide the constitutionality of 26 U. S. C. A., Sections 4705(a) and 4731. Petitioner contends that these statutes are unconstitutional under the Constitution of the United States and the 5th and 6th Amendments thereto, for the reason that they are indefinite and vague in their definition of "narcotic drug."

Section 4705(a) in no way defines a narcotic drug. How-

ever, by referring to 26 U. S. C. A., Section 4731, certain substances are enumerated as narcotic drugs, and in addition, "Any substance (and any compound, manufacture, salt, derivative, or preparation thereof) which is *chemically identical with any of the substances referred to in clauses (1) and (2)*". This statute in no way defines in what way substances may be chemically identical with any of the other substances referred to in 26 U. S. C. A., Section 4731, sub-sections 1 and 2. The act does not state whether by weight, neutrons, protons or electrons, by effect, color or otherwise. The statute recognizes that man-made substances may be included. The question thus becomes what chemist is going to determine how the substances are chemically identical? It has not been too long ago that there were 92 chemical elements. Now there are in excess of 100. It is an unreasonable argument that the Congress could delegate or define as a narcotic drug something which is not in existence at the time the act is created, which is unknown to the Congress, to chemists or others, and the effects of which are unknown. In the American system of criminal jurisdiction the accused is entitled to a definite and certain statement as to what the law is, so that the layman may reasonably ascertain what the law on a given subject really is. This rule tempers the very harsh rule which is also recognized in our system of jurisprudence, that is, every person is presumed to know the law and ignorance of a valid law is no defense nor excuse for the violation of same.

Petitioner questioned the constitutionality of these two statutes in the trial court by his special answer and plea (Appendix, p. 13) which was denied. (Appendix, p. 18.)

Petitioner submits that parts of these statutes are so obviously invalid on their face as not to stand one second under judicial scrutiny. Referring to those provisions of the statutes which empowers "the Secretary or his dele-

gate after due notice and opportunity for public hearing, to have an addiction-forming or addiction-sustaining liability similar to morphine or cocaine, and proclaimed by the President to have been so found by the Secretary or his delegate," to determine what an opiate consists of, therefore making the Secretary and or his delegate and the President of the United States legislators of criminal law.

Statutes must be clear and certain in their definition, and if vague or indefinite, violate the Constitution of the United States.

> *Winters* v. *New York*, 1947, 333 U. S. 507, 68 S. Ct. 665.
>
> *Musser* v. *Utah*, 1948, 333 U. S. 95, 68 S. Ct. 397.
>
> *Cantwell* v. *Conn.*, 1940, 310 U. S. 296, 60 S. Ct. 900.
>
> *Lanzetta* v. *New Jersey*, 1939, 306 U. S. 451, 59 S. Ct. 618.

The above cases hold such statutes violate the 14th Amendment, and in *U. S.* v. *Cohen Grocery*, 1920, 255 U. S. 81, 41 S. Ct. 298, such vague and indefinite statute was held to violate the 5th and 6th Amendments to the Constitution.

The act complained of does not specify what notice is to be given, does not disclose what a public hearing shall consist of, and permits the President and Secretary and or his delegate or others to establish the criminal laws of the United States. The act in no way limits those to whom the Secretary may delegate the powers to determine what is a narcotic drug. Certainly, where the penalty is so great as in the instant case, the law should be clear, certain, and not subject to any question or ambiguity.

In view of the fact that this Court has never passed upon the constitutionality of the above acts in the manner presented by this petition; because of the great penalty imposed, and because of the substantial federal question

thus presented, this Court should grant certiorari on this point of law.

4. Prejudicial error was committed by the announcement in the presence and hearing of the jury that the petitioner's motions for judgment of acquittal would be overruled.

The trial court's announcement, "I would deny each of the motions for judgment of acquittal," (Appendix, pp. 157-158) expresses, in effect, an opinion as to the sufficiency of the Government's evidence to convict this petitioner, based upon the sum total of the Government's evidence only.

Although a trial judge, under the federal practice, may comment upon the evidence, it has been held that he must comment upon the evidence for both sides, and must not express an opinion as to the guilt or innocence of the defendant. *Stoneking* v. *U. S.* (C. C. A. 8th, 1956), 232 F. 2d 385, 389; Cert. denied 252 U. S. 835.

The trial court at no time instructed the jury to disregard his opinion, as evidenced by his ruling upon petitioner's motions for judgment of acquittal. Certainly, this ruling by the trial court in the presence and hearing of the jury, would mislead the average layman as to its effect, and it would impart to the jury that in the court's opinion the petitioner was guilty as shown by the Government's evidence. The effect of the ruling in the presence and hearing of the jury was so prejudicial to this petitioner, that no amount of instruction could have cured its effect. The definition of the word "acquittal" is to "free and clear" as from accusation; declare innocent; exculpate; exonerate; to relieve, as of an obligation; to absolve, justify or pardon. See Practical Standard Dictionary, Vol. 1. The court having refused to free and clear from an accusation or to declare innocent, it would naturally follow that it would

be impossible for a jury to do what the trial judge had refused to do.

In *Breese* v. *U. S.* (C. C. A. 4th, 1901), 108 F. 804, 805, a new trial was ordered after the trial court had used the words, "'that in his opinion, it was the duty of the jury to convict the defendant,'" holding that this "*was calculated to mislead the jury who perhaps construed this language as a direction on the part of the court, we think that it would be proper to grant a new trial. For these reasons the case is remanded to the court below, with instructions to grant a new trial.*" (Our emphasis.)

5. The evidence establishes entrapment as a matter of law.

The record clearly shows that as a matter of law the defense of entrapment was established.

The government offered into evidence the testimony of a special agent (informer), John Arthur Smith. Through the testimony of the informer, Detective Alton Cherry and narcotics agent, John Wilkie, it was shown that Mr. Smith was "out to get" petitioner. (Appendix, p. 47.) The informer's connection with the detective and narcotics agent was such that the informer was able to have the sheriff of Posey County, Indiana, where he was incarcerated, call Detective Cherry. Detective Cherry, along with the narcotics agent then went to Mt. Vernon, Indiana, and obtained Smith's release from jail, without bond. (Appendix, p. 167.) Although charged with passing a forged prescription for obtaining narcotic drugs, the informer was released to the detective and narcotic agent by the prosecuting attorney and sheriff of Posey County, Indiana. When they released the informer they were under the impression that he was going to be retained in custody. (Appendix, p. 63.) When the informer was brought to Evansville, he was never placed in jail, but was released. (Appendix, p. 70.) The evidence also established that the informer had had

possession of narcotics several times since the filing of the indictment against the petitioner herein, and at least once prior thereto. (Appendix, pp. 50-52, 67.)

Although he was charged with the above offense in Posey County, Indiana, he had not been tried on that offense (Appendix, p. 50), nor has he ever been tried on any of the other offenses involving his possession of narcotic drugs, while this petitioner's cause was pending. He was, in effect, given complete immunity by the government. The informer himself testified that he went to Detective Cherry for the purpose of "getting" petitioner. (Appendix, p. 57.) The idea of creating the crime was commenced and planned at that time.

This Court in *Sherman* v. *U. S.*, 1958, 356 U. S. 369, 78 S. Ct. 819, 821, 822, said:

> "Entrapment occurs only when the criminal conduct was 'the product of this creative activity' of law enforcement officers * * *."

This Court further stated:

> "* * * Undoubtedly the impetus for such achievements was the fact that in 1951 Kalchinian was himself under criminal charges for illegally selling narcotics and had not yet been sentenced. * * * The Government cannot make such use of an informer and then claim disassociation through ignorance."

The conduct of the detective and narcotics agent in releasing the informer from criminal prosecution, and the government's refraining from prosecuting the informer on other narcotics charges, although brushed aside lightly by the Court of Appeals, presents a very serious and important question, which should be decided by this Court, that is, to what extent may the government go, in effect, exchanging the liberty of an informer for his testimony. Certainly, this Court should not and would not condone or permit without contempt charges, an act by defense counsel or

the defendant personally, to so influence a prospective witness by obtaining his release, and in effect, guaranteeing his liberty. The converse should likewise be true.

The record thus shows a man who was supposed to be in custody on a narcotics charge, who by questionable methods was released from custody to a police officer and a federal narcotics agent, and who, more than anyone else, had a motive for testifying adversely to this petitioner. With the above facts weighing heavily against the credibility of the witness, Smith, and in addition, the subsequent possession of narcotic drugs by this witness with no prosecution resulting therefrom one must question the motives of the government in connection with this witness. Certainly, the government cannot provide the informer with the luxuries of freedom, and at the same time contend that this conduct does not amount to an entrapment. It must be remembered that in this case there is no conflict in the evidence. The evidence is from the government's witnesses and the witnesses presented by the defendant, for which there is no conflict. The idea for the commission of the crime and the laying of the plans were all originated by Smith and the two officers, rather than in the mind of this petitioner. (Appendix, p. 57.)

As Justice Roberts stated in *Sorrells* v. *U. S.*, 1937, 287 U. S. 435, 457, 53 S. Ct. 210, 218, 77 L. Ed. 413:

> "It is the province of the court, and of the court alone to protect itself and the government from such prostitution of the criminal law. The violation of the principles of justice by the entrapment of the unwary into crime should be dealt with by the court no matter by whom or at what stage of the proceedings the facts are brought to its attention."

It is difficult to comprehend why the conduct of the government in this case towards the witness Smith should be condoned. Because of the facts presented by this proposi-

tion, this Court should grant certiorari herein, in order to spell out and set up standards under which the government as well as a defendant must operate. This Court has previously recognized that private police officers, or detectives, or adjusters are open to suspicion of bias and prejudice. *District of Columbia* v. *Clawans*, 1937, 300 U. S. 617, 57 S. Ct. 600, 664-665. This Court should now recognize that by a course of conduct as in this case, the government may so influence a witness, that his testimony should be completely disregarded, and that such evidence establishes entrapment as a matter of law when the idea for the crime originates in the mind of the informer and detective working with the narcotics agent.

CONCLUSION.

This case involves a substantial federal constitutional question and important questions of law, which this Court should review by way of granting the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A.

Statutes Involved.

26 U. S. C. A., Section 4702:

(a) Preparations of limited narcotic content.—The provisions of this subpart and sections 4721 to 4726, inclusive, shall not be construed to apply to the manufacture, sale, distribution, giving away, dispensing, or possession of preparations and remedies which do not contain more than 2 grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than 1 grain of codeine, or any salt or derivative of any of them, in 1 fluid ounce, or, if a solid or semisolid preparation, in 1 avoirdupois ounce; or to liniments, ointments, or other preparations which are prepared for external use only, except liniments, ointments, and other preparations which contain cocaine or any of its salts or alpha or beta eucaine or any of their salts or any synthetic substitute for them: *Provided*, That such remedies and preparations manufactured, sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intentions and provisions of this subpart and sections 4721 to 4726, inclusive, *Provided further*, That any manufacturer, producer, compounder, or vendor (including dispensing physicians) of the preparations and remedies mentioned in this section, lawfully entitled to manufacture, produce, compound or vend such preparations and remedies, shall keep a record of all sales, exchanges, or gifts of such preparations and remedies in such manner as the Secretary or his delegate shall direct. Such record shall be preserved for a period of 2 years in such a way as to be readily accessible to inspection by any officer or employee

of the Treasury Department duly authorized for that purpose, and the State Territorial, District, municipal, and insular officers named in section 4773, and every such person so possessing or disposing of such preparations and remedies shall register as required in section 4722 and, if he is not paying a tax under section 4721, he shall pay a special tax of $1 for each year, or fractional part thereof, in which he is engaged in such occupation, to the official in charge of the collection district in which he carries on such occupation as provided in sections 4721 to 4726, inclusive.

(b) Decocainized coca leaves.—The provisions of this subpart and sections 4721 to 4726, inclusive shall not apply to decocainized coca leaves or preparations made therefrom, or to other preparations of coca leaves which do not contain cocaine.

(c) Government and state officials.—

(1) Stamping drugs. — Officials of the United States, territorial, District of Columbia, or insular possessions, State or municipal governments, who in the exercise of their official duties engage in any of the business described in sections 4721 to 4726, inclusive, shall not be required to stamp narcotic drugs, as prescribed in this subpart, but their right to this exemption shall be evidenced in such manner as the Secretary or his delegate may by regulations prescribe.

(2) Registration and payment of tax.—

For exemption of officials of the United States, Territorial, District of Columbia, or insular possessions, State or municipal governments from the requirements as to registration and the payment of special taxes, see section 4772(b).

Aug. 16, 1954, 9:45 a. m., E. D. T., c. 736, 68A Stat. 549.

26 U. S. C. A., Section 4705(a):

(a) General requirement.—It shall be unlawful for any

person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

26 U. S. C. A., Section 4731:

(a) Narcotic drugs.—The words "narcotic drugs" as used in this part shall mean any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(1) Opium, isonipecaine, coca leaves, and opiate;

(2) Any compound, manufacture, salt, derivative, or preparation of opium, isonipecaine, coca leaves, or opiate;

(3) Any substance (and any compound, manufacture, salt, derivative, or preparation thereof) which is chemically identical with any of the substances referred to in clauses (1) and (2).

(b) Person.—The word "person", as used in sections 4701 to 4707, inclusive, and sections 4721 to 4726, inclusive, shall be construed to mean and include a partnership, association, company, or corporation, as well as a natural person.

(c) Importer, manufacturer, or producer.—Every person who imports, manufactures, compounds, or otherwise produces for sale or distribution narcotic drugs shall be deemed to be an importer, manufacturer, or producer.

(d) Wholesale dealer.—Every person who sells, or offers for sale, any of said drugs in the original stamped packages as provided in section 4704 (a) shall be deemed a wholesale dealer.

(e) Retail dealer.—Every person who sells or dispenses from original stamped packages as provided in section 4704 (a) shall be deemed a retail dealer: *Provided,* That the office, or if none, the residence, of any person shall be considered, for the purpose of this part, except sections 4711 to 4715, inclusive, his place of business.

(f) The word "isonipecaine", as used in this part shall mean any substance identified chemically as 1-methyl-4-phenyl-piperidine-4-carboxylic acid ethyl ester, or any salt thereof, by whatever trade name designated.

(g) The word "opiate", as used in this part shall mean any drug (as defined in the Federal Food, Drug, and Cosmetic Act; 52 Stat. 1041, Section 201(g); 21 U. S. C. 321) found by the Secretary or his delegate after due notice and opportunity for public hearing, to have an addiction-forming or addiction-sustaining liability similar to morphine or cocaine, and proclaimed by the President to have been so found by the Secretary or his delegate. The Secretary or his delegate is authorized to issue necessary rules and regulations for carrying out the provisions of this subsection, and to confer or impose upon any officer or employee of the Treasury Department whom he shall designate or appoint, the duty of conducting any hearing authorized hereunder.

(h) Territory.—As used in this part—

(1) the word "territory" shall include the Trust Territory of the Pacific Islands, and

(2) the word "territorial" shall reflect such inclusion. Aug. 16, 1954, 9:45 a.m., E. D. T., c. 736, 68A, Stat. 557.

APPENDIX B.

IN THE UNITED STATES COURT OF APPEALS
for the Seventh Circuit.

September Term, 1960—January Session, 1961.

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
ARNOLD GEORGE LAUER,
Defendant-Appellant.

No. 13089,

Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.

February 8, 1961.

Before SCHNACKENBERG, KNOCH and CASTLE, *Circuit Judges.*

CASTLE, *Circuit Judge.* Arnold George Lauer, defendant-appellant, was indicted in a two count indictment charging unlawful sale of narcotics in violation of 26 U.S.C.A. §4705(a). A special answer and plea filed by defendant asserting the unconstitutionality of 26 U.S.C.A. §§ 4705(a) and 4731 was denied by the District Court and the cause proceeded to trial before a jury. Defendant was found guilty by the jury on both counts and was sentenced for a period of 7½ years on Count I, together with a fine of $3,000.00, and for a concurrent 7½ year period on Count II.

The contested issues sought to be raised by the defendant's appeal are:

1. Whether 26 U.S.C.A. § 4705(a) is so vague and indefinite and 26 U.S.C.A. § 4731 such an improper delegation of power that the District Court erred in denying the special answer and plea of defendant.
2. Did the proof as to Count I establish that defendant came within the exemption set forth in 26 U.S.C.A. § 4702?
3. Did the District Court commit prejudicial error by announcing denial of defendant's motions for acquittal within the presence and hearing of the jury?
4. Was the government required, in order to establish illegality of the sales of narcotics, to prove existence of order forms prepared and issued by the Secretary of the Treasury or his delegate?
5. Did the District Court err in admitting government exhibits in evidence?
6. Was the defense of entrapment established by the record?

26 U.S.C.A. § 4705(a) makes it unlawful for any person:

> "to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

26 U.S.C.A. § 4731 defined[1] "narcotic drugs" as including (1) certain designated named items, (2) any compound, manufacture, salt, derivative, or preparation thereof, and (3) any substance chemically identical therewith. It also included within the definition:

> "* * * any drug * * * found by the Secretary or his delegate, after due notice and opportunity for public hearing, to have an addiction-forming or addiction-sustaining liability similar to morphine or cocaine, and proclaimed by the President to have been so found by the Secretary or his delegate. The Sec-

1. As the Section read on the date alleged in the indictment.

retary or his delegate is authorized to issue necessary rules and regulations for carrying out the provisions of this subsection, and to confer or impose upon any officer or employee of the Treasury Department whom he shall designate or appoint, the duty of conducting any hearing authorized hereunder."

The narcotic drugs referred to in the indictment and proofs in the instant case were Pantopon (morphine) and Cocaine Alkaloid. These substances are described in the first two categories, "(1)" and "(2)" of § 4731. Thus it becomes unnecessary for us to consider the contentions advanced by the defendant that the provision of § 4731 which makes "chemically identical" substances narcotic drugs is constitutionally invalid because too vague and indefinite, and that the provisions including as narcotic drugs any drug found by the Secretary of the Treasury or his delegate to have addiction-forming or addiction-sustaining liability similar to morphine or cocaine constitute an unconstitutional delegation of legislative authority. The defendant's interests are not affected by the provisions of which he complains. They have no application in the instant case and the defendant is not in a position to raise the constitutional issues. *United States* v. *Ausani*, 7 Cir., 240 F. 2d 216, cert. den. *Milner* v. *United States*, 353 U. S. 936, rehearing denied, 353 U. S. 978.

The burden was upon the defendant to prove that he came within the exemption of § 4702(a). *United States* v. *Chiarelli*, 7 Cir., 192 F. 2d 528, cert. den. 342 U. S. 913. That the government did not prove the exact quantity of morphine contained in the 150 milligrams of Pantopon involved did not establish the sale as exempt. To sustain a claim of exemption it must be established that there were less than ¼ grain of morphine per avoirdupois ounce (less than .00120 grain of morphine) contained in the 150 milligrams and that active medical ingredients other than

narcotics were contained in the preparation. Furthermore, preparations containing Pantopon are not within the exemptions accorded by § 4702. 26 C.F.R. 151.421(b).

At the close of the government's case and prior to the introduction of evidence on behalf of the defendant, counsel approached the bench and in the presence of the jury the District Court announced: "I would deny each of the motions for a judgment of acquittal". Counsel for defendant then moved for a mistrial asserting that the announcement was made within the hearing of the jury. It is contended that the court committed prejudicial error in making the announcement and reversible error in not granting a mistrial. The record does not disclose whether the jurors or any of them heard the announcement as defendant asserts. But the government does not controvert the assertion that the announcement was made within the hearing of the jury. We disagree with defendant that the announcement was tantamount to an expression by the court that in its opinion the defendant was guilty. And, assuming the jurors heard what the court said, we are of the veiw that the instructions given cured any error. Defendant's reliance upon *Breese* v. *United States*, 4 Cir., 108 F. 804 is misplaced. There the court told the jury it was their duty to convict the defendant. From our review of the record here, and the instructions given, we are satisfied that defendant was given a fair trial and that the District Court's refusal to grant a mistrial was not reversible error.

There is no merit to defendant's contention that it was incumbent upon the government to prove that the Secretary of the Treasury or his delegate has prepared and issued order forms for the sale of narcotic drugs. The statute, § 4705(a), prohibits the sale of such drugs except in pursuance of a written order executed on such a form. Without such order form, whether they are in existence or not, the sale of narcotic drugs is illegal.

We have examined the testimony concerning the identification and chain of custody of the government's exhibits and conclude that the District Court did not err in admitting them in evidence. Defendant complains that the informer-witness was not asked to identify the actual exhibits although he testified he handed the drugs to the government agent on each of the occasions involved. The government agent testified that the government exhibits in question were handed to him by the informer-witness on the dates in question. The failure to elicit the information in the same manner from the informer-witness did not make the identification insufficient as defendant seems to urge.

We find nothing in the record which lends any color to defendant's claim of entrapment. This contention is wholly devoid of any merit. On the facts presented in the record before us *United States* v. *Stocker*, 7 Cir., 273 F. 2d 754, and *United States* v. *Becker*, 2 Cir., 62 F. 2d 1007 are pertinent. The jury was warranted in concluding that the informer-witness merely afforded defendant an opportunity and the defendant embraced the opportunity. There is no basis for a finding of entrapment as a matter of law. That the informer-witness was released from custody on other narcotic law violation charges does not, as urged by defendant, in and of itself constitute his activities an entrapment of defendant. He had bought narcotic drugs from defendant on prior occasions. The jury was properly instructed on entrapment and there was evidence from which it could properly conclude that the idea of the criminal conduct was not implanted in defendant's mind by either the informer-witness or the law enforcement officers and that defendant was not induced to commit an offense.

We have carefully considered all other arguments advanced by defendant in support of his position on the issues raised but conclude that the judgment order of the District Court should be affirmed.

AFFIRMED.

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SUPREME COURT, U. S.

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No. 106

In the Supreme Court of the United States

October Term, 1961

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v.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 106

ARNOLD GEORGE LAUER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 19–23) is reported at 287 F. 2d 633.

JURISDICTION

The judgment for the court of appeals was entered on February 8, 1961. A petition for rehearing was denied on April 12, 1961. An order by the Chief Justice extended the time for filing a petition for a writ of certiorari to and including May 22, 1961, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner had standing to challenge the constitutionality of statutory provisions defining narcotic drugs, which do not relate to the charges against him.

2. Whether, at the close of the government's case, it was prejudicial for the court, in the presence of the jury, to deny petitioner's motions for judgment of acquittal.

3. Whether the evidence showed entrapment as a matter of law.

STATUTES INVOLVED

26 U.S.C. 4705, 68A Stat. 551, provides:

> (a) GENERAL REQUIREMENT.—It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

26 U.S.C. 4731, 68A Stat. 557, provides in pertinent part as follows:

> Definitions.
>
> (a) NARCOTIC DRUGS.—The words "narcotic drugs" as used in this part shall mean any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:
>
> (1) Opium, isonipecaine, coca leaves, and opiate;

(2) Any compound, manufacture, salt, derivative, or preparation of opium, isonipecaine, coca leaves, or opiate;

(3) Any substance (and any compound, manufacture, salt, derivative, or preparation thereof) which is chemically identical with any of the substances referred to in clauses (1) and (2).

* * * * *

(g) OPIATE.—The word "opiate", as used in this part shall mean any drug (as defined in the Federal Food, Drug, and Cosmetic Act; 52 Stat. 1041, section 201(g); 21 U.S.C. 321) found by the Secretary or his delegate, after due notice and opportunity for public hearing, to have an addiction-forming or addiction-sustaining liability similar to morphine or cocaine, and proclaimed by the President to have been so found by the Secretary or his delegate. The Secretary or his delegate is authorized to issue necessary rules and regulations for carrying out the provisions of this subsection, and to confer or impose upon any officer or employee of the Treasury Department whom he shall designate or appoint, the duty of conducting any hearing authorized hereunder.

* * * * *

STATEMENT

Petitioner was charged in count 1 of an indictment, returned in the United States District Court for the Southern District of Indiana, with the unlawful sale on October 15, 1959, of six tablets of pantopon, a narcotic drug, in violation of 26 U.S.C. 4705(a) (App. 5).[1]

[1] "App." refers to the Appendix filed in the Court of Appeals.

Count 2 charged petitioner with an unlawful sale of approximately 3.165 grams of cocaine alkaloid on October 29, 1959 (App. 5–6). Petitioner's special answer and plea attacking the constitutionality of 26 U.S.C. 4705(a) and 4731 was denied prior to trial (App. 13–15, 18). The jury found petitioner guilty on both counts, and the court imposed a $3,000 fine and a 7½ year sentence under count 1, and a 7½-year concurrent sentence under count 2 (App. 208–210). On appeal, the conviction was affirmed (App. 210–211).

Evidence adduced at the trial may be summarized as follows:

1. On October 4, 1959, while John Smith, a drug addict, was being held in jail in Mount Vernon, Indiana, on State narcotics charges, he asked that he be permitted to speak to Alton Cherry, an Evansville police officer (App. 161–163, 167). Previously, Smith had told Cherry that he was trying to get his girl friend off the drug habit, and that he therefore wanted to get petitioner arrested and sent to prison for "pushing" narcotics (App. 47, 75, 110–111). Cherry was able to get the local prosecutor and sheriff to turn Smith over to Cherry and John Wilkie, a federal narcotics agent. The charges against Smith were left pending (App. 159, 161–163, 167–168).

Count 1: On October 15, 1959, in Evansville, Indiana, after agent Wilkie and Cherry had searched Smith, had found no narcotics and no order form, and had given him $15 in official advance funds (App. 21–22, 29–30, 37–38, 97), Smith asked petitioner if he could get some tablets. Petitioner replied in the affirmative (App. 39). Smith got into petitioner's auto-

mobile, discussed price and then paid petitioner $15 for six tablets (App. 39–40). During the time when Smith and petitioner were together, they were under observation by Wilkie and Cherry. No other person came in contact with Smith (App. 23, 24, 31–32, 34–35). After Smith alighted from petitioner's car, he gave the tablets to Wilkie (App. 32, 41). A search of Smith showed that the $15 advanced to him was gone (App. 85). Later analysis showed that the tablets contained pantopon hydrochloride, basically impure morphine hydrochloride, a narcotic drug (App. 138).

Count 2: On October 28, 1959, petitioner offered to sell Smith a bottle of morphine atropin hydrochloride, but Smith said he wanted cocaine instead, for which the agreed price was $25 (App. 41–42). On October 29, 1959, Wilkie and Cherry again searched Smith, found no narcotics and no order forms, and gave him $30 in government funds, having recorded the serial numbers (App. 25, 33, 42–43). While seated in the petitioner's car, Smith paid petitioner $25 for a bottle labelled "cocaine alkaloid" (App. 44, 85). During the time petitioner and Smith were together, they were under constant surveillance. No other person came in contact with Smith (App. 25–28, 33–34, 35). After Smith left petitioner's car, he gave the bottle to Wilkie, who searched Smith and found that he had no narcotics and only $5 of the $30 left (App. 44, 85, 107–108).[3] Analysis showed

[3] On November 2, 1959, petitioner, in exchanging a number of bills at a bank, turned in one of the marked $5 bills used by Smith in making his $25 payment for the cocaine (App. 87, 102–103).

that the bottle contained 100% cocaine, a narcotic drug (App. 144–145, 148).

Smith testified that prior to October 15 and October 29, 1959, he had purchased narcotics from petitioner (App. 71, 77, 78).

2. After the government had rested its case and counsel approached the bench out of the hearing of the jury, the following colloquy occurred (App. 157–158):

> THE COURT: I would deny each of the motions for a judgment of acquittal.
>
> MR. LOCKYEAR [petitioner's counsel]: Your Honor, we would move for a mistrial based upon the Court's announcing that in the presence of the jury.
>
> THE COURT: All right, you make your record.
>
> MR. LOCKYEAR: The defendant would move for a mistrial at this time and ask that the Court dismiss the jury for the reason the Court has announced at the close of the evidence of the Government that both of the defendant's motions for the judgment of acquittal have been overruled, said announcement was made in the presence of the jury in open court and within their hearing.
>
> THE COURT: The motion is denied. You may proceed.

ARGUMENT

1. Petitioner challenges the constitutionality of 26 U.S.C. 4705(a) and 26 U.S.C. 4731 (*supra*, pp. 2–3), on the grounds (1) that the provision of subsection (a)(3) of Section 4731 which defines substances "chemically identical" to certain named drugs as nar-

cotic drugs is too vague and indefinite, and (2) that the provisions of Section 4731(g), including as narcotic drugs any drug found by the Secretary of the Treasury or his delegate to have "an addiction-forming or addiction-sustaining liability similar to morphine or cocaine," is an unconstitutional delegation of legislative authority (Pet. 6–9). Since petitioner's conviction does not rest on these provisions but upon subsections (a)1 and (2), he has no standing to challenge their unconstitutionality. In order to attack a statute as unconstitutional, a party must show that the alleged unconstitutional feature would result in direct injury to him. *E.g., Premier-Pabst Co.* v. *Grosscup,* 298 U.S. 226, 227; *Massachusetts* v. *Mellon,* 262 U.S. 447, 488.

2. There is no merit to the contention that the court committed reversible error in denying petitioner's motions for judgment of acquittal at the end of the government's case in the presence and hearing of the jury (Pet. 9–10). See the Statement, *supra,* p. 6. The announcement that the court "would deny each of the motions for a judgment of acquittal" (App. 157) was not an opinion that petitioner was guilty.[3] It was directed to counsel, not to the jury, and was merely a ruling that there should be no acquittal at that particular stage of the trial. Thereafter petitioner proceeded with his defense (App. 158–174).

Moreover, whatever effect on the jury the court's

[3] This situation is entirely unlike that in *Breese* v. *United States,* 108 Fed. 804, 805 (C.A. 4), where the judge in his direct charge to the jury stated "that, in his opinion, it was the duty of the jury to convict the defendant."

announcement might have had was clearly offset by the following statement in the court's final charge (App. 197–198):

> If I have said or done anything which has suggested to you that I am inclined to favor the claims of or positions of either side, you will not suffer yourselves to be influenced by any such suggestion. I have not expressed, nor have I intended to express, any opinion as to what witnesses are or are not worthy of credence, or what inference or inferences should be drawn from the evidence adduced in this case.

3. Finally, contrary to petitioner's assertion (Pet. 10–13), there was no entrapment as a matter of law. Unlike *Sherman* v. *United States,* 356 U.S. 369, where there were a number of repetitions of the request before the accused sold narcotics to the informer, in the present case, the special employee Smith, who had made previous purchases from petitioner, found no need to use persuasion to get petitioner to sell him the narcotics specified in the indictment.

Nor is it material that Smith wanted to "get" the petitioner on a federal narcotics charge or that Smith was released from jail on a State narcotics charge, which was left pending. Smith, in acting for the government agents, did not implant into the mind of an innocent person the idea of committing the crimes; rather, as a ready and willing participant, he merely afforded petitioner opportunities to make the illegal sales. Thus, the entrapment issue was properly submitted to the jury under correct instructions (App.

184–185), to which no objection was made. Cf. *Masciale* v. *United States*, 356 U.S. 386; *United States* v. *Stocker*, 273 F. 2d 754, 756 (C.A. 7), certiorari denied, 362 U.S. 963.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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